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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MICHAEL G. NEW,

Petitioner,

v.

WILLIAM S. COHEN,
SECRETARY OF DEFENSE, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF NATIONAL CITIZENS LEGAL NETWORK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae National Citizens Legal Network (NCLN) is a project of Citizens United Foundation,[1] and it is the instrument through which Citizens United Foundation

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[1] This brief was not authored in whole or in part by counsel for any party. It has been funded in its entirety by the *amicus curiae*. *See* Sup. Ct. Rule No. 37.6.

The *amicus curiae* requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. *See* Sup. Ct. Rule No. 37.3(a).

advances its views in the courts. Citizens United Foundation is a nonprofit, nonpartisan, educational organization established to conduct research and to inform and educate the public on a variety of issues of national importance, including issues related to sovereignty, separation of powers, the original intent of the Framers and the correct interpretation of the United States Constitution.

NCLN and Citizens United Foundation believe that the pending case presents the Court with important constitutional questions touching American sovereignty and separation of powers involving the original intent of the Framers and the correct interpretation of the Constitution. In particular, this brief urges the Court to grant Mr. New's petition for a writ of certiorari in order to determine whether the court of appeals has decided correctly that Mr. New has no right to have his habeas corpus petition heard until he exhausts his appeals before a military court that has no authority to rule on his constitutional claims.

STATEMENT OF FACTS

On August 21, 1995, United States Army Medical Specialist Michael J. New learned that he and the other members of his unit would soon be deployed to Macedonia to serve as "United Nations Fighting Persons." As such, Mr. New would be required to wear a United Nations uniform, carry United Nations identification, and forfeit the protections afforded United States servicemen by the Geneva Convention, in favor of the protections afforded "United Nations Fighting Persons" by the UN Charter. He would also fight under the

command of officers, each of whom swore not to seek or accept instructions with respect to the performance of any duties from any government or authority other than the United Nations (including anyone in the command structure of the U.S. Army up to and including the President of the United States).

Mr. New protested, requesting transfer to a unit not under United Nations command, or alternatively, an honorable discharge from the Army. On October 10, 1995, Mr. New was ordered to don the United Nations uniform, and he refused to do so, explaining his belief that the order was illegal and unconstitutional. He was convicted by court-martial on January 24, 1996 for failure to obey a lawful order, and sentenced to a Bad Conduct Discharge.

Mr. New petitioned for a writ of habeas corpus, contending, *inter alia*, that it was unlawful for him to wear the badges or accept the office of a foreign government, and seeking an honorable discharge. His petition was denied by the district court, *New* v. *Perry*, 919 F. Supp. 491 (D.D.C. 1996), and the district court's judgment was affirmed by the court of appeals, *New* v. *Cohen*, 129 F.3d 639 (D.C. Cir. 1997).

Mr. New's sentence was suspended pending appeal, and Mr. New is currently on involuntary leave from the Army.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari presents an important question involving the authority and obligation of Article III courts to adjudicate claims based on the Constitution. The court of appeals denied the claim for habeas corpus relief of the petitioner, Michael New, on the theory that comity requires Article III courts to await the adjudication of collateral issues by the Article I military tribunals. But the law does not require such abstention where the underlying constitutional claim properly is one for determination by the Article III court, and not an Article I tribunal, and where the petitioner's claim cannot be resolved by the Article I tribunal.

In this case, Michael New's constitutionally-based claim that he is entitled to an honorable discharge from the United States Army will not be adjudicated by the military courts' review of the bad conduct discharge thus far decided against him. Such determinations fall within the province of Article III courts. Moreover, the prior decisions of this Court indicate that habeas corpus jurisdiction for Article III adjudication of Mr. New's claim presently lies. Finally, if there is no such Article III adjudication at this time, and the court martial verdict against Mr. New is sustained by the military tribunals, the court of appeals offers no assurance that habeas or other relief in an Article III court would be available.

By refusing to provide Article III review of the merits of Mr. New's claim at this time, while requiring Mr. New to await final disposition of the collateral charges against him in

the military courts, the court of appeals' decision doubly prejudices Mr. New's constitutional rights. Applying the principle of comity so as to preclude adjudication of Mr. New's constitutional claim by an Article III court neither accords with the Constitution nor follows the prior decisions of this Court. Therefore, this *amicus curiae* believes, with the petitioner, that the court of appeals' decision should be reversed. This issue is a proper one for full briefing and review by this Court. *Certiorari* should be granted.

ARGUMENT

The Petition for Certiorari being supported by this *amicus curiae* presents to the Court for determination the fundamental issue of whether the principle of comity as applied to appeals pending before military tribunals requires Article III civil courts to deny habeas corpus relief to a petitioner whose important constitutional claims could otherwise escape adjudication by an Article III court.

The decision of the lower courts would require the petitioner, Michael New, to exhaust military appeals of his court martial conviction, in a case where that conviction was based exclusively on Mr. New's principled refusal to violate his oath as a member of the Armed Forces by refusing to obey an illegal and unconstitutional order to transfer his allegiance to a foreign sovereign by becoming a soldier of the United Nations. The lower courts refused to entertain habeas relief, while military appeals are pending, which may be Mr. New's only opportunity for review by an Article III court.

The Court must determine whether military tribunals are the appropriate forum to rule on the validity of the order given to Mr. New, determining the merits of Mr. New's constitutional and other claims[2] which the district court found had raised "**important** issues, implicating the **balance of power** between the President as Commander-in-Chief and the Congress and the relationship between the United States and the United Nations" and which the district court "has taken...**seriously**." *New* v. *Perry*, 919 F. Supp. 491, 497-500 (D.D.C. 1996) (emphasis added).

The Supreme Court has determined that the principle of "comity" dictates that "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention...." *Schlesinger* v. *Councilman*, 420 U.S. 738, 758 (1974). As explained by the district court, "[d]eference by the federal court avoids friction between the two court systems and may avert unnecessary or duplicative proceedings in the event that the military outcome obviates the need for judicial intervention." *New* v. *Perry*, 919 F. Supp. 491, 496.

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[2] Mr. New has challenged the President's legal authority, as Commander-in-Chief of the Armed Forces of the United States, to order Mr. New to become a soldier in the armed forces of the United Nations in violation of his oath of enlistment in the U.S. Army to support and defend the Constitution of the United States of America, as well as the terms of that enlistment.

In the instant case, however, requiring Mr. New to continue adjudicating his case before military tribunals is, at best, an exercise in futility. Rather than avoiding duplicative proceedings, deference to the military tribunals virtually guarantees duplicative proceedings, assuming that Mr. New's claim eventually would be entertained by an Article III court, a matter that is far from certain, as discussed *infra*.

The court of appeals stated that Mr. New's conviction was reviewable by the Army Court of Criminal Appeals, with the possibility of a discretionary appeal to the Court of Appeals for the Armed Forces which is composed of civilian judges, and is a legislative Article I court. *New v. Cohen*, 129 F.3d 639, 642 (D.C. Cir. 1997).

A military tribunal comprised of military personnel subordinate to the President of the United States is clearly not the proper forum to consider "unprecedented" and "important issues, implicating the balance of power between the President as Commander-in-Chief and the Congress and the relationship between the United States and the United Nations" as stated by the district court. The Court of Appeals for the Armed Forces, likewise, as a legislative, Article I Court, has no meaningful role in determining the proper constitutional relationship between the Congress and the President. In neither case is there a need to tap the special expertise of the military courts, as the constitutional issue raised is clearly beyond both their expertise and competence.

Since the very early days of the Republic, it has been firmly established that Article III courts are vested with the

power and obligation to interpret the Constitution and laws of the United States arising thereunder. "The constitution vests the whole judicial power of the United states in one Supreme Court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 173-74 (1803). "It is **emphatically** the **province** and **duty** of the judicial department to say what the law is." *Id.* at 177 (emphasis added).

When presented with an actual case or controversy, the judicial branch has the obligation to define limits of the powers of the various branches of the federal government, the essence of Mr. New's constitutional claims. In *Marbury* v. *Madison*, for example, the Court concluded that it did not have the power to issue a writ of mandamus to the Secretary of State, because the issuance of such a writ required the exercise of original jurisdiction and the Constitution limited the Court's original jurisdiction to all "cases involving ambassadors, other public ministers and consuls, and those in which a state shall be a party." *Id.* at 174.

In *Powell* v. *McCormack*, 395 U.S. 486 (1969), the Court construed Congress's powers. It held that the House of Representatives was limited to applying only the standing qualifications expressly prescribed by Article I, Section 5 of the Constitution in judging the qualifications of its members

The Court has also had occasion to define the contours of Presidential powers and privilege. For example, in

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952), the Court held that the President, absent statutory authorization, did not have the power to order the seizure and operation of the nation's steel mills by the government. More recently, in *Clinton* v. *Jones*, 520 U.S. ___, 117 S.Ct. 1636 (1997), the Court held that the Constitution does not accord the President temporary immunity from civil litigation arising out of events occurring before he took office.

Unquestionably, the judicial branch has been viewed by this Court as being vested by the Constitution with the power and obligation to define the powers and privileges of a particular branch of government. As the Court explained in *Baker* v. *Carr*, 369 U.S. 186 (1962):

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. [*Id.*, at 211.]

Such power should not be delegated to, shared with, or exercised by military tribunals or Article I courts. In *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court held that 28 U.S.C. § 1471, by which Congress made a broad grant of jurisdiction to Article I bankruptcy courts, is unconstitutional. As the plurality opinion states: "The judicial power of the United States must be exercised by courts having the attributes prescribed in Art.

III." *Id.*, p. 59. The Court, in *Commodity Futures Trading Commission* v. *Shor*, explained the fundamental rationale underlying this rule, stating that Article III, section 1 serves "to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'" 478 U.S. 833, 848 (1986) (*quoting U.S.* v. *Will*, 449 U.S. 200, 218 (1980)).

The right of litigants discussed in *Shor* has been protected by this Court despite government appeals for deference to the military courts. Thus, where an Article I military tribunal has assumed jurisdiction over an individual, the Court has recognized that he or she may petition an Article III court for habeas corpus relief when the petition raises a substantial and unresolved constitutional claim. In *Reid* v. *Covert*, 354 U.S. 1 (1957), the Court affirmed the power to the district courts to grant relief to the spouses of military personnel who were unconstitutionally subjected to prosecution under the Uniform Code of Military Justice. Similarly, in *McElroy* v. *Guarliardo*, 361 U.S. 281 (1960), the Court held that a civilian employee of the armed forces serving with the armed forces in a foreign country cannot constitutionally be subjected to a court-martial in time of peace. And in *Toth* v. *Quarles*, 350 U.S. 11 (1955), the Court held that a former Air Force serviceman could not constitutionally be subjected to trial by court-martial for crimes alleged to have been committed while he was in the military. In each of these cases, the Court determined that adjudication of the petitioner's claim should proceed immediately in the Article III court, and should not await further proceedings by the Article I tribunal.

Although not explicitly stated within these opinions, in each case the implicit justification for deciding the merits of the petitioners' claims was that Article III courts were the appropriate forum for adjudicating what were found to be substantial constitutional claims. Indeed, the Court took note of this very point in *Noyd* v. *Bond*, 395 U.S. 683 (1969), commenting that in *Reid*, *McElroy* and *Toth*, *supra*, it "vindicated complainants' claims without requiring exhaustion of military remedies," because "we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented." *Id.* at 696, n.8.

With respect to the issue of expertise, the court of appeals found that the case of *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), was controlling, and under that case that "military courts are capable of, and indeed may have superior expertise in, considering challenges to their jurisdiction over disciplinary proceedings." *New* v. *Cohen*, 123 F.3d 639, 645. But in *Councilman* the issue presented was whether a service member's alleged offense is "service related." That authority is inapposite here, where important constitutional issues have been raised, as discussed, *supra*.

The decision of the court of appeals violates Mr. New's right to have his constitutional claims heard before an Article III court as the proper forum for adjudicating substantial constitutional claims. Instead, the court of appeals held that Mr. New present those claims "to the military authorities reviewing his case." *New* v. *Cohen*, 129 F.3d 639, 646.

The Article III Courts' refusal to accept jurisdiction of this substantial constitutional claim should not stand, even if Mr. New would ultimately be able to pursue his claims in an Article III Court. There is no reason to require Mr. New to suffer needless delay, force him and his attorneys to waste precious resources, and put his life on hold for an even longer period, while the military courts conduct a judicial exercise for which they were never designed. The factual record in this case is fully developed, and an Article I court is not competent to rule on Mr. New's constitutional claims in any event. As a consequence, requiring Mr. New to exhaust his military appeals prior to seeking habeas relief would be pointless and wasteful. As the Court explained in *Fay* v. *Noia*, 372 U.S. 391, 437 (1963), "comity does not demand that such a price in squandered judicial resources be paid; the needs of comity are adequately served in other ways."

But there is an even greater risk. Unless the district court is directed to proceed with the habeas corpus petition, there is no guarantee that Mr. New would eventually be able to have his claims aired in an Article III court. Both the district court and the court of appeals appeared to indicate that Mr. New might, but not necessarily would, have his claims heard on the merits in an Article III court.

The district court stated: "[o]nce the military proceedings are completed, Specialist New may either move to reopen this proceeding or file a new petition for a writ of habeas corpus." The district court did not, and perhaps could not, say whether the district court would consider the petition on its merits.

The court of appeals was much more guarded in its assessment of the likelihood of Mr. New obtaining review in an Article III court, and implicitly questioned whether the district court was correct in stating that habeas corpus would be an available remedy. The court of appeals seemed to assert that only if the court-martial jury had ordered his incarceration in a military prison, a scenario which the Court said is "now foreclosed," could he have filed a habeas petition in federal district court. *New v. Cohen*, 129 F.3d at 647.[3]

That option having been foreclosed, a conviction with an other than honorable discharge would leave him only two possible options, according to the court of appeals. First, "[i]f

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[3] The court of appeals' view of the unavailability of post-discharge habeas relief could be accurate. Federal habeas corpus relief is available to persons held "in custody" in violation of the Constitution of the United States or the laws enacted thereunder, 28 U.S.C. § 2241. Mr. New's sentence does not include incarceration; he was sentenced to a bad conduct discharge only. Once Mr. New's last military appeal is concluded, arguably, he could be considered to no longer be in the custody of the military if his sentence is affirmed by military authorities; yet he would continue to suffer the stigma of a bad conduct discharge without the certainty of having his constitutional claims ruled on by an Article III court via a habeas petition. Under the Army's theory of the case, by not having incarcerated Mr. New, and then arguing comity to avoid habeas review at this time, the Army could be attempting to manipulate circumstances so as to avoid an Article III court's review of Mr. New's bad conduct discharge and the important constitutional issues he raises about the authority of the Army to issue the very orders Mr. New is challenging.

he suffers monetary losses as a result of his discharge, he **may** be able to collaterally attack the underlying conviction in the United States Court of Federal Claims, an Article I court under 28 U.S.C. §§ 171(a). Second, "New also **might** be able to bring an action in district court seeking nullification of the conviction underlying his bad conduct discharge. And by way of further caveat, the court of appeals stated that "[i]n delineating these scenarios, however, we **do not mean to suggest** that New's claims have merit or that **a federal court would even reach the merits** of his arguments." *New v. Cohen*, 129 F.3d at 648 (emphasis added).

In truth, by requiring Mr. New to exhaust his military remedies before an Article III court will entertain a habeas corpus petition, the court of appeals may have effectively denied Mr. New the right to have his important constitutional claims ruled on by an Article III court within the judicial branch of the federal government. Surely, the principle of comity, however important, cannot be allowed to result in the complete abrogation of Mr. New's right to a hearing on the merits of his constitutional claims before an Article III court. To provide Mr. New his proper day in court, the district court should be directed by the court of appeals to entertain Mr. New's habeas petition without further delay.

CONCLUSION

For the reasons stated above, the National Citizens Legal Network urges the Court to grant the Petition for Writ of Certiorari of Michael New.

Respectfully Submitted,

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